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No. 92-2052

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CENTRAL ARIZONA WATER CONSERVATION DISTRICT, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

GRAND CANYON TRUST AND THE WILDERNESS SOCIETY

Respondents - Intervenors

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF ARIZONA IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals properly uphold an Environmental Protection Agency regulation which will significantly limit the sulfur dioxide emissions from the Navajo Generating Station, the single largest source of sulfur dioxide emissions in the State of Arizona?

"In the Grand Canyon, Arizona has a natural wonder which, so far as I know, is in kind absolutely unparalleled throughout the rest of the world. . . . Leave it as it is. You cannot improve on it. The ages have been at work on it, and man can only mar it. What you can do is to keep it for your children, your children's children, and all who come after you, as the one great sight which every American . . . should see."

President Theodore Roosevelt
speaking at the South Rim
of the Grand Canyon, May, 1903

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INTEREST OF THE AMICUS CURIAE

In this case, the Court of Appeals for the Ninth Circuit upheld the Environmental Protection Agency's ("EPA") final rule which limited the sulfur dioxide (SO_2) emissions from the Navajo Generating Station ("NGS") for the protection of the air quality at the Grand Canyon National Park ("Park") pursuant to the Clean Air Act's Visibility Protection Program. This brief is submitted in support of Respondent EPA's opposition to the petition of Central Arizona Water Conservation District, et al., for a writ of certiorari to overturn the decision of the Court of Appeals.[1/]

1/ Central Arizona Water Conservation District, et al. v. United States Environmental Protection Agency, 990 F.2d 1531 (9th Cir. 1993).

In this action, the State of Arizona speaks as the primary regulator of NGS's air pollution emissions, as well as the host to the millions of persons who visit the Park annually, all of whom are adversely affected by NGS's SO_2 emissions within the Park.

The Grand Canyon is justly described as one of the greatest natural wonders of the world, a geologic display without equal, as well as a scenic beauty of unforgettable majesty. The Park, under federal protection since 1893, is perhaps the nation's preeminent national park and is also Arizona's own crown jewel.

Arizona is immeasurably enriched by the location of the Canyon within its borders, yet the Canyon cannot be truly experienced and enjoyed unless the air at the Park is clear. On some days, a visitor standing on the rim of the Canyon cannot

see the opposite rim due to the air pollution from NGS (located near Page, Arizona, approximately 15 miles from the Park), the single largest source of SO_2 emissions in the State of Arizona, emitting over 70,000 tons of uncontrolled SO_2 per year. Petitioners' Excerpts of Record ("ER") 15 at 13. National Park Service studies project that high pollution days in the Canyon will increase from 9 to about 30 days per summer by the year 2010 if expected increases in sulfate pollution occur. 136 Cong. Rec. S2887 (daily ed. March 21, 1990). NGS emissions also adversely affect neighboring states, as well as the eight national parks on the Colorado plateau. Respondent's Supplemental Excerpts of Record ("SER") 2 at 11-1. All Park visitors, from hikers deep in the Canyon to visitors viewing and photographing the Canyon from the Rim, are

adversely affected by visibility impairment at the Canyon. Arizona Supplemental Excerpts of Record ("AZ SER") 1.

Federal and state law mandate the State of Arizona to protect the State's air quality. Section 110(a)(3) of the Clean Air Act, 42 U.S.C. § 7410(a)(3), places primary responsibility for the prevention of air pollution with the individual states. The Arizona Legislature, like the Congress before it, has declared air pollution to be a severe public health threat which must be remedied. Section 49-401, Arizona Revised Statutes Annotated, declares a state policy of no further air quality degradation and orders the Arizona Department of Environmental Quality ("ADEQ") to abate air pollution. The State of Arizona, through ADEQ, regulates the SO_2 emissions from NGS pursuant to state (Ariz. Rev. Stat. Ann. § 49-426) and

federal law (42 U.S.C. § 7410).

The State has been an active participant in the federal government's determination that NGS contributes to visibility impairment at the Park which must be abated pursuant to 42 U.S.C. § 7491, the Clean Air Act's Visibility Protection Program. The State has given substantial technical advice to EPA to assist EPA and National Park Service studies of air quality at the Park and at NGS. The State, through the Governor's office and ADEQ, participated in the negotiations with NGS and EPA which resulted in the present EPA rule limiting SO_2 emissions from NGS pursuant to 42 U.S.C. § 7491 and 40 C.F.R. §§ 51.300-51.307. 56 Fed. Reg. 50,176 (Oct. 3, 1991). Further, upon EPA approval, the State will enforce the EPA rule at NGS as it currently enforces NGS compliance with

ADEQ's own SO_2 emission limitation rule, R18-2-503(G)(1) of the Arizona Administrative Code.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE VALIDITY OF THE CHALLENGED EPA REGULATION WHICH WAS ADOPTED PURSUANT TO LAW AND IS ESSENTIAL TO CURTAIL THE IMPAIRMENT OF VISIBILITY AT THE PARK

A. THE TECHNICAL DATA WHICH EPA RELIED IN MAKING ITS DETERMINATION THAT NGS CAUSES VISIBILITY IMPAIRMENT AT THE PARK IS VALID

Arizona supports EPA's determination that NGS's SO_2 emissions contribute to the impairment of visibility in the Park and must be reduced through the installation of pollution control technology pursuant to 40 C.F.R. § 51.302. EPA's final rule (56 Fed. Reg. 50,172 (Oct. 3, 1991)) governing SO_2 emissions from the

NGS is reasonable, technically sound, and was adopted in accordance with the Clean Air Act and federal rulemaking requirements. As a public agency which also regulates air pollution and promulgates air quality rules, ADEQ fully supports EPA's technical data, its procedures, its response to public comments and its final rulemaking action. EPA's promulgation of the challenged rule fits squarely within the requirements of the statutes and regulations. See Kamp v. Hernandez, 752 F.2d 1444 (9th Cir.), modified, 778 F.2d 527 (9th Cir. 1985) (upholding Arizona's unique "multi-point rollback" system in its State implementation plan for SO_2 emissions control for copper smelters as a "reasonable" interpretation of the Clean Air Act).

ADEQ submitted written comments to EPA in support of the Winter Haze Intensive

Tracer Experiment (WHITEX) study, which EPA relied upon, inter alia, in making its determination that visibility impairment at the Park is reasonably attributable to NGS. As part of its technical review of the WHITEX study, ADEQ reviewed weather conditions in the region over a one hundred year period (January and February, 1899 through 1980) to determine what percentage of time meteorological conditions suitable to the accumulation of air pollutants in the NGS vicinity occurred, with subsequent transport of those pollutants to the Park. AZ SER 4. ADEQ found that the weather conditions which result in air stagnation in the Park area occurred, on average, greater than fifty percent of the time during the winter months, further emphasizing the technical soundness of EPA's determination that NGS contributes to the impairment of visibility at the Park,

which triggers the remediation requirements under the Clean Air Act.

Commenting on the EPA rule, the Western States Air Resources Council stated:

> The test of RAI, [reasonably attributable impairment] currently codified in regulation requires that impairment be "attributable by visual observations or any other technique the State deems appropriate." [40 C.F.R. 51.301(s)] This is in accordance with traditional practice of police powers necessary to protect public health, safety, and welfare.
>
> The basic test of applicability of environmental regulation, at all levels of government, has been "reasonable" evidence; thus everything from air quality standards to individual source permitting is based on a combination of scientific and engineering evaluations and "common sense" interpretation of probable relationships between emissions and effects of pollutants. To require multi-million dollar studies and results having minimal ranges of uncertainty as a matter of course would effectively

> prevent states or EPA from timely fulfillment of their regulatory responsibilities under the Act.
>
> It is especially important that this principle of presumptive impact based on "reasonable" evidence be preserved in the present proceeding, lest the whole business of developing emission limitations or air quality standards, for any purpose, become mired in unresolvable disputes over suitable levels of specificity, whether applied to individual sources or entire regions.
>
> Such residual uncertainty as may exist in this or future proceedings might be a basis for latitude in regulatory decisions by the Administrator or other responsible parties, but would not be a basis for regulatory paralysis.

EPA's determination that NGS's emissions contributes to the impairment of visibility at the Park was based on reasonable evidence and should not be disturbed.

B. THE CREATION OF THE GRAND CANYON VISIBILITY TRANSPORT COMMISSION IN THE 1990 CLEAN AIR ACT AMENDMENTS UNDERSCORES THE CLEAR INTENT OF CONGRESS TO STRENGTHEN THE VISIBILITY PROTECTION PROGRAM AT THE CANYON

Congress enacted 42 U.S.C. § 7491 in 1977 for the abatement of visibility impairment at the federal parks. In 1990, Congress again underscored the importance of visibility protection in the federal parks with the creation of visibility transport regions and commissions to assist EPA in assessing scientific and technical information pertaining to visibility impairment in federal parks. 42 U.S.C. § 7492. The creation of the Grand Canyon Visibility Transport Commission, evidences particular Congressional concern for the Park. 42 U.S.C. § 7492(f).

Several senators voiced strong support for the increased protection of air quality in federal parks contained in the

1990 amendments to the Clean Air Act. In statements supporting the creation of the Grand Canyon Visibility Transport Commission, both Senators DeConcini and McCain identified NGS as a significant contributor to wintertime visibility impairment at the Park and emphasized the importance of fully implementing the visibility protection laws for all of the federal parks and the Grand Canyon National Park, in particular. 136 Cong. Rec. S3814-15 (daily ed. April 3, 1990). Further, Senator Domenici stated:

> Where a source of visibility impairment has been identified and regulatory action is warranted, we must be prepared to act decisively to prevent undue delay or obstruction. If the administrative process breaks down, which we hope it will not, I would want to work with my colleagues to legislatively remedy such a situation.

Id. at S3815. Significantly, Senator Wirth

stated that the visibility transport regions and commissions provided by the 1990 Clean Air Act Amendments provide "new tools" for EPA and federal land managers "to work together with Governors of affected states and others to achieve the goals set by Section 169A(a) of the Act." 136 Cong. Rec. S2887 (daily ed. March 21, 1990). (emphasis added). If the EPA rule is vacated, administrative action will be unduly delayed or obstructed and the Congressional goal in passing and amending the Clean Air Act will be thwarted.

C. CLEAR VISIBILITY AT THE PARK IS VITAL TO THE STATE'S TOURISM INDUSTRY

The Grand Canyon is the premiere tourist attraction in a state where tourism is the State's second largest industry. Over 3.5 million people visited the Park in 1987; approximately 662,000 of these people

visited the Park during the winter months. SER 1, Att.1. In 1989, winter attendance at the Park was approximately 800,000, approximately 21 percent of the total annual visitation to the Park. 56 Fed. Reg. 5,180 (Feb. 8, 1991). According to National Park Service analysis, total sales at the Park, direct and indirect, from tourism and tourism supported businesses were over 35 million dollars in the 1984-85 winter season, rising to over 55 million dollars in the 1986-87 winter season. The tax base added by tourism rose from over 2 million dollars in the 1984-85 winter months to over 3 million dollars in the 1986-87 winter months. AZ SER 1. EPA studies report that the economic benefits of preserving visibility at the Park are 3.4 billion dollars annually, for a net present value of approximately 31.8 billion dollars. Id. Clearly, the cost of

continued failure to reduce the level of air pollutants in the Park exceeds greatly the cost to control those pollutants at NGS.

D. THE COST TO NGS TO COMPLY WITH THE EPA RULE WILL ACHIEVE THE GREATEST LEVEL OF EMISSION REDUCTIONS AT THE LEAST COST

Salt River Project ("SRP"), the operating agent for NGS, estimate the capital cost of compliance with the challenged regulation to be 430 million dollars, the total estimated levelized annual cost to be 89.6 million dollars, as contrasted with 510 million dollars and 106 million dollars, respectively, under the regulation originally proposed by EPA. 56 Fed. Reg. 50,177 (Oct. 3, 1991). The owners of NGS do not challenge this regulation. Having negotiated the terms of this regulation with EPA in a manner which

reduced the costs of compliance, the owners of NGS have agreed to assume these control costs. Further, NGS was originally built to accommodate wet flue gas desulfurization, an economically proven control technology for meeting EPA's 0.10 lb/MM Btu SO_2 emission limitation. 56 Fed. Reg. 50,178 (October 3, 1991).

Secretary of the Interior Bruce Babbitt, Arizona's former Governor and Attorney General, testified concerning his twenty years of involvement with SRP and NGS and of the early commitments made by the Bureau of Reclamation and SRP to install state-of-the-art emission controls at NGS. SER 3 at 41-47. Interior Secretary Babbitt's concern for the preservation of air quality over the Park echoes the statement made in 1970 by then Interior Secretary Walter J. Hickel, who

stated, regarding the proposed NGS, that:

> The Grand Canyon area of the Colorado River is of particular concern to me. We must not allow anyone to pollute the environment there, and it would be unthinkable for us to pollute it ourselves.

56 Fed. Reg. 5,177 (Feb. 8, 1991).

E. THE STATE HAS BEEN DILIGENT IN REDUCING SULFUR DIOXIDE EMISSIONS THROUGHOUT THE STATE. AS NGS IS THE STATE'S LEADING PRODUCER OF SULFUR DIOXIDE, ITS EMISSIONS MUST BE REDUCED AS WELL

Both EPA and Arizona have taken numerous actions to reduce SO_2 emissions to improve the quality of the State's air. 40 C.F.R. § 60.43(a)(2) limits SO_2 discharges in excess of 1.2 pounds per million Btu. An ADEQ rule limits NGS to not more than 1.0 pound of SO_2 per million Btu. Arizona Administrative Code R18-2-503(G)(1). In 1989, ADEQ amended the NGS operating permit to require the facility to begin monitoring its SO_2 emissions in

order to track the facility's compliance with Arizona Administrative Code R18-2-503(G)(1).

Further, the Asarco copper smelter in Hayden, Arizona, installed in 1983 a flash furnace which increases SO_2 capture efficiency under the terms of a 1981 consent decree with EPA. EPA and ADEQ entered into a consent decree in 1987 with the Phelps Dodge copper smelter in Douglas, Arizona, which caused the smelter, one of the oldest in the country, to cease operations. The Magma copper smelter in San Manuel, Arizona installed a flash furnace under the terms of a consent decree entered into in 1988 with EPA and ADEQ. Three other copper smelters in Arizona closed down during the 1980s, at least in part due to the projected costs of Clean Air Act emission controls.

These closures caused major and unavoidable economic disruption to some of Arizona's rural communities, yet they were necessary to prevent further deterioration of the State's air quality. No such economic hardship may be even colorably argued by Petitioners herein, even assuming that their estimated cost increases resulting from utility rate increases by the owners of NGS are correct.

F. IF THE EPA RULE IS VACATED AND NGS IS NOT REQUIRED TO REDUCE ITS SO_2 EMISSIONS, THE STATE MAY BE REQUIRED TO OBTAIN SIMILAR REDUCTIONS FROM OTHER SOURCES WITH MUCH GREATER DISRUPTION TO THE STATE'S INDUSTRIES

If the EPA rule is vacated and NGS is not required to curtail its SO_2 emissions, the State may well be required to obtain SO_2 reductions elsewhere. 42 § U.S.C. 7492(d) requires a visibility

transport commission to submit recommendations to EPA regarding the imposition of the Clean Air Act's Part D requirements for nonattainment areas, which include the requirement that new major stationary sources comply with the "lowest achievable emission rate" limitation, which is the most stringent emission limitation standard imposed under the Clean Air Act. Such facilities within the Grand Canyon area could be required to meet this exacting standard were NGS to escape regulation under 42 U.S.C. § 7491 by the invalidation of EPA's rule herein.

Requiring certain industries in northern Arizona to submit to the most stringent environmental controls yet permitting the NGS, the single greatest single source of SO_2 emissions in the State and the second greatest source of SO_2 emissions in the western United

States, to evade the requirements of 42 U.S.C. § 7491, would be a manifest inequity, especially where the federal record shows that NGS does contribute to visibility impairment at the Park.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit correctly upheld the EPA rule. Arizona requests the Court to deny Central Arizona Water Conservation District's petition.

RESPECTFULLY submitted,

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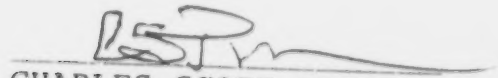

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